IN THE

Supreme Court of the United States

October Term, 1976

No. 76-929

RUSSELL OWENS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Opinions Below.

The memorandum opinion of the District Court for the Central District of California, together with the court's findings of fact and conclusions of law were filed on June 28, 1974 (unreported). The opinion of the Court of Appeals for the Ninth Circuit was filed on September 14, 1976, and is reported at 541 F.2d 1386 (9th Cir. 1976). Copies of the two opinions and the District Court's findings of fact and conclusions of law are attached hereto in the Appendix.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was filed and entered on September 14, 1976. A petition for rehearing was filed. By an order filed October 7, 1976, the petition for rehearing was denied.

The jurisdiction of this Court in conferred by 28 U.S.C. §1254(1).

Questions Presented.

Whether the new rule of law created by the lower court's decision (to wit: a statute of limitations for *filing complaints* can be determinative upon the question of whether *service of process* is valid) should be allowed to stand as precedent for a rule of federal procedure.

Whether one agency of the federal government (to wit: the Navy) can escape all responsibility for its alleged tortious conduct, leaving an injured party without legal remedy, by reason of the activity of another federal agency (to wit: the United States Marshal's Office).

Statutes Involved.

Petitioner sued the United States of America pursuant to the Public Vessels Act (46 U.S.C. §§781-790). At 46 U.S.C. §782, the Public Vessels Act incorporates by reference the procedural requirements set forth in the Suits in Admiralty Act (46 U.S.C. §§741-752). This case concerns that portion of 46 U.S.C. §742 which states:

> "The libelant shall *forthwith* serve a copy of his libel on the United States Attorney for his district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing." (Emphasis added.)

This case also concerns that portion of 46 U.S.C. §745 which states:

> "Suits as authorized by this chapter may be brought only within two years after the cause of action arises . . ."

Other relevant portions of the above-cited statutes are set forth in the Appendix.

Statement of the Case.

The record here is confined to the District Court Clerk's Record on Appeal and to the opinion of the Ninth Circuit Court of Appeals. All references to the Clerk's Record on Appeal will be made using the abbreviated notation "CR".

Petitioner was injured on October 26, 1971 (CR p. 1). He filed a complaint against the United States of America on September 12, 1973, well within the applicable two-year statute of limitations period set forth at 46 U.S.C. §745 (CR p. 1). His complaint alleged that his injuries were caused by the negligent operation of a United States Naval tugboat and that therefore the United States was liable under the Suits in Admiralty Act (46 U.S.C. §§741-752) and under the Public Vessels Act (46 U.S.C. §§781-790) (CR p. 1).

On the same day that the complaint was filed, a written request was made to the United States Marshal's Office asking that agency to serve the United States (CR p. 136). The Marshal's Office, however, *contrary to its past procedures* refused to serve the United States because the petitioner's attorneys had not supplied them with a prepared summons. A prepared summons was promptly typed and a second request for service was made. *Again*, the Marshal's Office refused to effect service, this time because its procedures required a separately prepared summons for both the United States Attorney and the Attorney General. Separate summons were promptly prepared and dispatched to

the Marshal's Office with a third request that the United States be served (CR p. 135). The United States Attorney was served on November 8, 1973, and the Attorney General was served on November 9, 1973 (CR p. 139). The time elapsing from the filing of the complaint to the serving of the complaint on the Attorney General was a period of fifty-eight (58) days.

On May 17, 1974, respondent filed a motion for summary judgment (CR p. 97). On June 28, 1974, the District Court granted respondent's motion based on its findings that (1) petitioner had failed to serve the United States Attorney "forthwith" as required by U.S.C. §742, and that (2) petitioner's service of process was barred by laches because the service was not perfected until after a California State one-year statute of limitations for filing claims would have expired (CR pp. 138-145). Judgment was entered for respondent on July 1, 1974 (CR p. 146).

Petitioner appealed to the Ninth Circuit Court of Appeals. On September 14, 1976, the Circuit Court upheld the District Court's ruling (*Owens v. United States,* 541 F.2d 1386). The opinion of the court did not discuss the validity of the District Court's holding that petitioner was barred by laches. Therefore this issue is not before this court. Also not discussed in the opinion of the court below was the significance of the delays caused by the United States Marshal's Office. The lower court apparently ignored this issue despite the fact that petitioner's written briefs had

stressed its importance and that the issue had dominated the discussion during oral argument before the lower court.

The court below apparently based its decision solely upon what appears to be a new rule of law. It did so without citation of statutory authority or decisional background:

> "In this case the accident occurred on October 26, 1971; suit was filed on September 12, 1973; proper service was not effected until November 9, 1973, more than two years after the occurrence of the event giving rise to the claim of liability. Whatever may be the rule where dilatory service occurs within the two-year statute of limitations, *we hold that where service is not made forthwith and the delay extends beyond the period of limitations, it is proper for the district court to dismiss the action on motion of the government.*" (Emphasis added.) (*Owens, supra,* p. 1388).

REASONS FOR GRANTING THE WRIT.

I

The Writ Should Be Granted Because the Court Has Never Before Considered the Nature of the "Forthwith" Clause in 46 U.S.C. §742 and Because the Lower Courts Which Have Considered the Nature of the "Forthwith" Clause Are in Conflict.

Congress, in creating the Public Vessels Act, required that plaintiffs effect service of process upon the United States "forthwith". The meaning of "forthwith service" was left unclear by Congress. By refraining from defining "forthwith service" in terms of a fixed time period, Congress evidenced a purposeful intent that the courts evaluate what is "forthwith" on a case by case basis, recognizing that each case involves factors and circumstances which are unique to that case alone.

This Court has not established criteria for determining what factors and circumstances should be considered in judging whether a service of process is "forthwith". Courts of inferior jurisdiction are in apparent disagreement as to what these factors and circumstances should be. One approach seems to be to simply look only at the period of time which elapses between the filing of the complaint and the service of process. See *City of New York v. McAllister Brothers, Inc.*, 278 F.2d 708 (2 Cir., 1960). Under this view, the *only* question to be asked is whether Congress would have considered the elapsed time at issue to be within its definition of "forthwith". This approach ignores the fact that if Congress had intended the courts to consider *only* the elapsed time period, it would have simply defined "forthwith service" in terms of a *fixed limitation period.*

Another approach is illustrated by the lower court's decision in the instant case. The court seemingly made an initial determination that petitioner's service of process was "dilatory." It then looked to whether the service of process was effected after the date when the statute of limitations would have run (*Owens, supra,* p. 1387). As is discussed below, the use of the statute of limitations period as a factor to be considered in the validity of service of process is arbitrary and unreasonable. It ignores the fact that if Congress had intended for the courts to use the statute of limitations period to limit the validity of service of process, it would have simply done so by restating the statute of limitations in 46 U.S.C. §745 to say:

> "Suits as authorized by this chapter may be brought *and served* only within two years after the cause of action arises . . ."

The dismissal of an otherwise valid legal action is a very serious matter. This Court should establish with same reasonable certainty what factors and circumstances should be weighed and examined by the courts in determining whether "forthwith" service has been effected.

We assert that these factors and circumstances should at least include the following: the diligence with which the plaintiff attempted speedy service, the hardship caused to the plaintiff by a dismissal of his lawsuit, the contribution, if any, by federal government agencies (*e.g.*, the United States Marshal's Office) to the overall delay in service, and *the prejudice, if any, caused to the federal government by the delay in service.* All of these factors and circumstances should be carefully examined in each case. A determination that

a plaintiff's suit should be dismissed for failure to effect "forthwith" service should not be made unless, after weighing the gravity of the totality of factors and circumstances surrounding the case, the court believes it would be less equitable to proceed than to not proceed.

II

The Writ Should Be Granted Because the Decision of the Lower Court Establishes a Rule of Statutory Construction Which Fails to Meet the Test of Reason and Logic.

The opinion of the lower court stated:

> *"Whatever may be the rule where dilatory service occurs within the two year statute of limitations, we hold that where service is not made forthwith and the delay extends beyond the period of limitations, it is proper for the district court to dismiss the action on motion of the Government."* (*Owens, supra,* p. 1388).

The lower court's approach, it would appear, is to first examine the elapsed period of time between the filing of the complaint and service of process and determine if this period indicates that service was "dilatory". If so, then the court is to look to see if service was effected within the period of time allowed for the filing of the complaint. If service was not effected within that period, then the court is proper to dismiss the action for failure to comply with the "forthwith" clause of 46 U.S.C. §742.

The court's use of the statute of limitations to evaluate the time for service of process is simply impermissible. This is a wholly new and unprecedented approach. It makes use of one statutory period to evaluate a wholly unrelated statutory period.

The statute of limitations is the maximum period of time within which Congress has determined that a lawsuit can fairly be commenced under the Suits in Admiralty and Public Vessels Acts (see 46 U.S.C. §745). It must be presumed that in fixing the statute of limitations, Congress weighed the inequity to the United States of having to defend itself against stale claims verses the need of plaintiffs for time within which to sufficiently recover from their injuries, investigate their legal rights and draw up and file their complaints.

The "forthwith" clause, on the other hand, defines the maximum period of time within which Congress has determined that service of process can fairly be effected under the Suits in Admiralty and Public Vessels Acts. In formulating its definition of this time period, Congress was dealing with a problem wholly different from the problems resolved by the statute of limitations. The service of process period had to have been defined after weighing the need for prompt notification upon the responsible United States officials as to a pending lawsuit versus the need of plaintiffs for time to locate the responsible officials and to comply with the bureaucratic procedures for effecting proper service upon them.

The needs for the two statutory periods are independent of one another and the factors which were considered in formulating each period are unrelated. There is no legal or equitable rationale for the interrelation of these two statutes.

If the ruling below is allowed to stand, it will not only establish an illogical rule for the evaluation of the "forthwith" clause, but it will also stand as precedent for the concept that the limiting language in *any* federal statute can arbitrarily be evaluated and defined by reference to another, wholly unrelated statute. Such precedent is unnecessary, unwarranted and should be set aside.

III

The Writ Should Be Granted Because the Circuit Court's Decision Would Allow the Procedural Delays Fostered by One Federal Agency to Immunize the Tortious Conduct of Another Federal Agency.

In evaluating petitioner's diligence with which he attempted service of process, the lower courts seemingly looked only to the fifty-eight (58) day time period between filing and service. Both courts ignored petitioner's evidence that the delay was caused in significant part by the procedural roadblocks and pitfalls created by the United States Marshal's Office. The result was to give tacit approval to the concept that the delays caused by a federal agency are irrelevant to the determination of a plaintiff's diligence. The acceptance of this view is to allow the actions of one agency to immunize the alleged tortious conduct of another agency. The result is to deprive damaged citizens of their rightful day in court.

Here petitioner attempted to effect service of process through the use of the United States Marshal's Office *as required* by *Federal Rule of Civil Procedure* 4(c). He made his initial request to the Marshal's Office *on the very same day* that he filed his complaint.

However, it took *two additional requests* before the Marshal's Office eventually effected service. *These facts were uncontested throughout the proceedings below.* We submit that it would be a violation of due process and fair play to hold petitioner responsible for the entire fifty-eight (58) day delay in service. Accordingly, we urge that the lower court's ruling be set aside and that the matter be remanded to the District Court for trial on the merits.

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Of Counsel:
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JACK TENNER,
DENTON ANDERSON.

APPENDIX.

Memorandum Opinion.

United States District Court, Central District of California.

Russell Owens, Plaintiff, vs. United States of America, T. R. Parker, A. F. Falkefjell, A. S. Dovrefjell and A. S. Luksefleu, Defendants. Civil No. 73-2162-RF.

Filed: June 28, 1974.

Motion of defendants FALKEFJELL, DOVREFJELL and LUKSEFLEU to dismiss granted, with the proviso that plaintiff may file an amended Complaint. As presently pleaded, the third cause of action does not clearly set forth the theory apparently relied upon.

Amendment to be filed on or before July 22, 1974.

Motion of defendant UNITED STATES OF AMERICA for summary judgment is granted. Plaintiff failed to comply with the service requirements set forth in 46 U.S.C.A., Section 742. *City of New York v. McAllister,* 278 F.(2) 708; *Battaglia v. U.S.,* 303 F(2) 683. Even assuming that factual circumstances could arise which would excuse service as late as in this case, the affidavit attached as Exhibit "A" to plaintiff's memorandum is inadequate to establish any such circumstances.

Dated this 28th day of June, 1974.

/s/ Robert Firth
Robert Firth, Judge of the
United States District Court

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

Russell Owens, Plaintiff, v. United States of America, T. R. Parker, A. F. Falkefjell, A. S. Dovrefjell and A. S. Luksefleu, Defendants. Civil No. 73-2162-RF.

Filed: June 28, 1974.

Findings of Fact

1. Defendant United States of America, through its agency, the Department of the Navy, was at all times material the owner and operator of certain Navy tugboats in the Long Beach-Los Angeles harbor area. These tugboats are public vessels of the United States.

2. On September 12, 1973, plaintiff, Russell Owens, filed suit against the United States for damages alleged to have been caused by the negligent operation of a Navy tugboat on October 26, 1971. Plaintiff's complaint alleges no reason or excuse for the nearly two year delay in bringing this action against the United States.

3. Plaintiff alleges jurisdiction pursuant to the Public Vessels Act, 46 U.S.C. §§ 781-790.

4. The summons and complaint were served upon the United States Attorney on November 8, 1973, and upon the Attorney General on November 9, 1973.

5. In answering the complaint, the United States denies all liability to plaintiff and affirmatively alleges as a defense that the Court lacks jurisdiction of the subject matter and of the person of the defendant because plaintiff has failed to effect forthwith service upon the United States as required by 46 U.S.C. § 742, and that the action is barred by limitations and laches.

Conclusions of Law

1. Jurisdiction of plaintiff's claim against the United States is governed by the provisions of the Public Vessels Act, 46 U.S.C. §§ 781-790, and the Suits in Admiralty Act, 46 U.S.C. §§ 741-752.

2. The Public Vessels Act at 46 U.S.C. § 782 incorporates by reference the jurisdictional requirements for service upon the United States as set forth in the Suits in Admiralty Act, 46 U.S.C. § 742, as follows:

> The libelant shall forthwith serve a copy of his libel on the United States Attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service shall constitute valid service on the United States. . . .

3. Service of the summons and complaint on the United States Attorney and the Attorney General nearly two months after the filing of the complaint does not constitute forthwith service within the meaning of the Suits in Admiralty Act, 46 U.S.C. § 742, *California Casualty Indemnity Exch. v. United States*, 74 F. Supp. 404 (S.D. Cal. C. Div. 1947); see also *Battaglia v. United States*, 303 F. 2d 683 (2d Cir. 1962), *cert. dism.* 371 U.S. 907 (1962); *City of New York v. McAllister Brothers, Inc.*, 278 F. 2d 708 (2d Cir. 1960), 177 F. Supp. 679 (S.D.N.Y. 1959); *Orpen v. United States*, 1973 A.M.C. 914 (N.D. Cal. 1973) [not otherwise reported]; *Barry v. United States*, 1971 A.M.C. 783 (N.D. Cal. 1970) [not otherwise reported]; *United States v. M/V PITCAIRN*, 272 F. Supp. 518 (E.D. La. 1967); *Glover v. United States*, 109 F. Supp. 701 (S.D.N.Y. 1952);

Marich v. United States, 84 F. Supp. 829 (N.D. Cal. 1949).

4. Plaintiff having failed to comply with the jurisdictional service requirements of the Suits in Admiralty Act, this Court lacks jurisdiction over the subject matter of the action and the person of the defendant. Plaintiff's action must accordingly be dismissed.

5. The two year delay in bringing this action is presumed to be prejudicial to defendant United States because of the one year California statute of limitations, California Code of Civil Procedure, § 340 (3), for similar actions brought in California. *Espino v. Ocean Cargo Line, Ltd.*, 382 F. 2d 67, 68 (9th Cir. 1967); *Brown v. Kayler*, 273 F. 2d 588, 591-592 (9th Cir. 1959).

6. Plaintiff having neither alleged any excuse or reason for the delay in bringing this action nor shown that the two year delay was not prejudicial to defendant United States, this action is barred by limitations and laches. *Larios v. Victory Carriers, Inc.*, 316 F. 2d 63, 66 (2d Cir. 1963). For this additional reason plaintiff's action must therefore be dismissed.

DATED this 28 day of June, 1974.

/s/ R. Firth
United States District Judge

Opinion.

United States Court of Appeals, for the Ninth Circuit.

Russell Owens, Plaintiff-Appellant, v. United States of America, Defendant-Appellee. No. 74-3124.

Filed: September 14, 1976.

Appeal From the United States District Court for the Central District of California.

Before: KOELSCH, TRASK and KENNEDY, Circuit Judges. KENNEDY, Circuit Judge:

On October 26, 1971 appellant was injured, allegedly by the negligent operation of a passing Navy tugboat. Almost two years later, on September 12, 1973, he brought suit against the United States, for damages arising from that incident. On May 17, 1974, after both sides had engaged in detailed discovery procedures, the United States filed a motion for summary judgment, based on Owen's failure to effect service of process "forthwith" under 46 U.S.C. § 742.

It was undisputed that service on the United States Attorney and mailing of the complaint to the Attorney General occurred 58 days subsequent to the filing of the complaint. The district court granted the motion, finding that the 58 day delay did not constitute service forthwith and finding also that service was barred by a state statute of limitations. Both rulings are properly before us on this appeal under 28 U.S.C. § 1292(a)(3). City of New York v. McAllister Bros., 278 F.2d 708, 709, (2d Cir. 1960).

The United States may be sued in district court for damages caused by public vessels pursuant to the Public Vessels Act, 46 U.S.C. §§ 781-90. That Act

incorporates by reference 46 U.S.C. ch. 20, which is known as the Suits in Admiralty Act. 46 U.S.C. § 782. This Act provides, in relevant part, that,

> The libelant shall *forthwith* serve a copy of his libel on the United States Attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States . . . .

46 U.S.C. § 742 (emphasis added).

Only one circuit court has considered what constitutes "forthwith" service under this statute, and the effect of failure to make such service upon a libelant's cause of action. Battaglia v. United States, 303 F.2d 683 (2d Cir.) (service effected 4½ months after filing of the complaint), *cert. dismissed*, 371 U.S. 907 (1962); City of New York v. McAllister Bros., 278 F.2d 708 (2d Cir. 1960) (service effected 2 months after service of complaint). The Second Circuit in those cases held that service of process was not effected forthwith. It also concluded that the requirements of § 742 were a limited waiver of sovereign immunity, and therefore they were jurisdictional; hence failure to comply required the dismissal of the complaint. While several district courts in this circuit have resolved the issue in the same manner as the Second Circuit, *see, e.g.*, Brown v. United States, 403 F. Supp. 472, 474 (C.D. Cal. 1975); Marich v. United States, 84 F. Supp. 829 (N.D. Cal. 1949); California Casualty Co. v. United States, 74 F. Supp. 404 (S.D. Cal. 1947),

no panel of this court has previously ruled on this issue.

The wisdom of the Second Circuit rule might be doubted, particularly in view of criticism within that court. Battaglia v. United States, *supra*, 303 F.2d at 686 (Friendly, J., concurring). But we need not decide here the question of whether the failure to effect forthwith service upon the government under § 742 deprives the trial court of jurisdiction, for our review of the record reveals a critical distinction between the facts here and those of the Second Circuit cases cited. In this case the accident occurred on October 26, 1971; suit was filed on September 12, 1973; proper service of process was not effected until November 9, 1973, more than two years after the occurrence of the event giving rise to the claim of liability. Whatever may be the rule where dilatory service occurs within the two-year statute of limitations, we hold that where service is not made forthwith and the delay extends beyond the period of limitations, it is proper for the district court to dismiss the action on motion of the government.

The district court correctly determined that service effected 58 days after the filing of the complaint was not forthwith service under § 742, *see* City of New York v. McAllister Bros., *supra*, 278 F.2d at 710. In view of our disposition of the case, we find it unnecessary to decide the government's contention that the one-year state statute of limitations is superimposed on the two-year period provided by federal law.

AFFIRMED.

§ 742. Libel In Personam.

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

§ 743. Procedure in Cases of Libel In Personam.

Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between

private parties. A decree against the United States or a corporation mentioned in section 741 of this title may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder.

§ 745. Causes of Action for Which Suits May Be Brought; Limitations; Exceptions; Actions Which May Not Be Revived; Interest on Claims.

Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided*, That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: *Provided further*, That the limitations contained in this section for the commencement of suits shall not bar any suit

against the United States brought hereunder within one year after December 13, 1950, if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improperly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States or against the master of any such vessel: *And provided further,* That after June 30, 1932, no interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized by section 742 of this title unless upon a contract expressly stipulating for the payment of interest.

§ 746. Exemptions and Limitations of Liability.

The United States or a corporation described in section 741 of this title shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

§ 781. Libel in Admiralty Against or Impleader of United States.

A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation of towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* That the cause of action arose after the 6th day of April, 1920.

§ 782. Venue of Suit; Application of Provisions of Chapter 20.

Such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the provisions of chapter 20 of this title or any amendment thereof, insofar as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

§ 789. Exemptions and Limitations of Liability.

The United States shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels.

No. 76-929

In the Supreme Court of the United States

OCTOBER TERM, 1976

RUSSELL OWENS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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RUSSELL OWENS, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On September 12, 1973, petitioner filed a libel against the United States, pursuant to the Public Vessels Act, 43 Stat. 1112, 46 U.S.C. 781-790, in the United States District Court for the Central District of California. He alleged that on October 26, 1971, he had been injured by negligent operation of a Navy tug (Pet. App. 2). Under Section 2 of the Suits in Admiralty Act, 41 Stat. 525, as amended, 46 U.S.C. 742, which is incorporated by reference into the Public Vessels Act (46 U.S.C. 782), the United States Attorney and the Attorney General must be served "forthwith" with the summons and complaint upon the filing of suit, and "[s]uits * * * may be brought only within two years after the cause of action arises * * *." 46 U.S.C. 745.

In this case, the United States Attorney was not served until November 8, 1973, and the Attorney General was not served until November 9, 1973—nearly two months after the filing of the libel and two weeks after the expiration of the two-year statute of limitations. On the government's motion for summary judgment, the district court dismissed the suit for failure to comply with the statutory service requirements (Pet. App. 2-4).

The court of appeals affirmed (Pet. App. 5-7). It agreed with the district court that "service effected 58 days after the filing of the complaint was not forthwith service under §742" (Pet. App. 7) and further held that "[w]hatever may be the rule where dilatory service occurs within the two-year statute of limitations, we hold that where service is not made forthwith and the delay extends beyond the period of limitations, it is proper for the district court to dismiss the action on motion of the government" (*ibid.*).

The applicable statute, 46 U.S.C. 742, is a limited waiver of sovereign immunity that must be strictly construed. Consequently, the failure to comply with the statutory condition that service be made "forthwith" on the United States Attorney and the Attorney General requires dismissal. *Battaglia* v. *United States,* 303 F. 2d 683 (C.A. 2), certiorari dismissed, 371 U.S. 907. *City of New York* v. *McAllister Bros., Inc.,* 278 F. 2d 708 (C.A. 2). Moreover, as the court of appeals recognized, the delay in this case resulted in service being effected after the two-year limitation period.

Petitioner contends that his failure to effect service "forthwith" was the fault of the United States Marshal's Office (Pet. 10). But while Rule 4(c), Fed.R.Civ.P., requires that "[s]ervice of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose," the governing

statute provides that "[t]he libelant shall forthwith serve a copy of his libel on the United States Attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing". 46 U.S.C. 742. It therefore was incumbent upon petitioner to see that service was promptly effected.

Moreover, since the statute provides that service upon the Attorney General shall be by registered mail, petitioner could have accomplished at least that service himself. See 4 Wright and Miller, *Federal Practice and Procedure,* §1092 (1969). As for personal service on the United States Attorney, petitioner could have applied, under Rule 4(c), for an order appointing a special process server. He failed to do either and permitted service to be delayed nearly two months, until after the expiration of the limitation period. In these circumstances, service was not "forthwith," and dismissal of the action was proper.

Finally, this case turns upon its unique and particular facts; it does not raise an issue of sufficiently general importance or applicability to warrant review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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